85-1221

Supreme Court, U.S.
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IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1985

NO.

LYNN FOSTER,

Petitioner,

vs.

ARCATA ASSOCIATES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did Petitioner Have the Technical Background and Experience Required for the Position at Nellis?

2. Was Nellis a "Separate Establishment" Under the Equal Pay Act?

3. Did Respondent's Conduct Establish a Prima Facie Case of Sex Discrimination?

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TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

Petitioner petitions following the Opinion of the United States Court of Appeals for the Ninth Circuit. This Opinion of October 2, 1985, in Case No. 84-2218, affirming the judgment of the United States District Court for the Northern District of California, Honorable William A. Ingram, Judge, in

favor of Defendants (Respondents herein) in Case No. C-83-20084 WAI, became final on December 3, 1985, when the United States Court of Appeals for the Ninth Circuit denied rehearing.

Petitioner submits this statement to show that the Supreme Court of the United States has jurisdiction of the matter and that a substantial question is presented.

OPINION BELOW

The Opinion of the Court of Appeals is reported pursuant to the Order of the same Court, since the Opinion carries a legend "For Publication". Said published Opinion is attached hereto as Appendix "B".

JURISDICTION

The complaint for relief was brought by Plaintiff (Petitioner

herein), a female employee of ARCATA ASSOCIATES, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 2000(3) et seq., and the due process and equal protection clauses of the Fourteenth Amendment, against ARCATA ASSOCIATES, INC., and certain of its officials. The employee claims that certain employment practices of ARCATA are unlawfully discriminatory on the basis of sex, age, and wage discrimination. The United States District Court for the Northern District of California, Honorable WILLIAM A. INGRAM, Judge, granted Defendant summary judgment. (Appendix "A"). The employee appealed to the Court of Appeals for the Ninth Circuit, which affirmed. The employee then petitioned for rehearing, which was denied on November 25, 1985, (Appendix "C") thus docketing of this appeal is timely.

STATUTES INVOLVED

The statute involved is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000(e), et seq., The Age Discrimination in Employment Act, 29 U.S.C. Section 621(d), and the Equal Pay Act, 29 U.S.C. Section 206(d).

STATEMENT OF THE CASE

Plaintiff and Petitioner, FOSTER, filed her complaint in this action on June 22, 1983, after receiving a Notice of Right to Sue from the Equal Employment Opportunity Commission on April 25, 1983 (Exhibit "A" to complaint). She alleged that she had been denied equal pay and had been subjected to illegal discriminatory treatment by reason of her age and sex. On June 13, 1984, the United States District Court, Northern District of California, Hon. William A. Ingram, Judge, granted ARCATA's motion for summary judgment and dismissed the action. This petition seeks review of the dismissal and the order upon which it is based.

The principal question presented is whether there is the total absence of any genuine issue as to all of the

material facts. (Robertson v. Seidman CA2d, 1979, 609 F2d 583; Bernald v. Gulf Oil Co. CA 5th, 1979). Unless this is established by the movant, who is held to a strict standard, summary judgment is inappropriate. (Poller v. Columbia Broadcasting Systems (1962) 368 U.S. 464, 82 S. Ct. 486).

There are uncontradicted facts, to be sure, but they do not support the award of a summary judgment. (Burgess v. Atlantic Coast Line R.R. Co. (D SC 1966) 39 FRD 588; Adickes v. S.H. Kress & Co. (1970) 398 U.S. 144, 90 S.Ct. 1598.

STATEMENT OF FACTS

A. INTRODUCTION.

FOSTER is a 58-year old woman who had been employed by defendant, ARCATA, as a Contracts Administrator in 1980. ARCATA did business at Monterey (Fort Ord), Nellis Air Force Base and at

Burlingame, where corporate headquarters were located. For more than 1 1/2 years, FOSTER worked at all three locations, although she resided at Monterey and had stated a preference for the Monterey location when she was employed. Although she had more than 25 years' experience in government contract administration and supervision, at very high levels of responsibility, she was paid substantially less than her male counterparts in comparable positions, although most had less qualifying experience or expertise. Although she was advised that she was performing her work, including the Nellis job, in an outstanding manner, and despite the fact that she was informed that a substantial raise was imminent, in fact, a 33 year-old male, William Hamby, was employed at Nellis at a salary 25% higher than FOSTER was receiving. Although it was

the policy of ARCATA to announce available positions in advance to all of its employees, so they could apply, if they wished, the Nellis position opening was kept secret by ARCATA until it had been filled. Damby had less than 2 years experience, was not a contract administrator and, upon his employment, FOSTER was notified that she would have to continue performing the contract administrator's job at Nellis, without the title. Accordingly, Foster the title of Director of Contracts and classified as Contract Administrator for more than one installation, including Nellis, FOSTER was being compensated at the rate of $30,000 per annum, while Damby, with substantially less experience or qualification and much lesser responsibility was receiving $27,500. The earlier promised raise in pay to FOSTER had not been implemented.

BEST AVAILABLE COPY

At the same time, male employees with responsibilities comparable to FOSTER's were compensated in the range of $40,000-$65,000 per annum, 33% to 117% more than she was paid.

ARCATA's claim that FOSTER was unqualified for the position for which Hamby was selected was not supported by the facts established. When ARCATA submitted its proposal for the Nellis contract, it listed FOSTER as the person who would fill the position and submitted her resume to establish that it had fully-qualified personnel to perform the required functions. Ironically, ARCATA obtained the Nellis contract, in part, by reason of the representations as to FOSTER's qualifications, which qualifications it now contends were inadequate.

In any event, the Appellate Court determined that FOSTER had satisfied her

burden of presenting evidence sufficient to generate a genuine issue of material fact about her qualification for the Nellis position (Opinion p. 12).

B. AS RELATED TO SPECIFIED ERRORS OF THE TRIAL COURT

A prima facie case of prohibited discrimination is established where FOSTER is within the protected class, has applied for an available position for which qualified and is denied the position, which is given to a younger person. It is admitted that all of these conditions exist, except for qualification. On this issue, the District Court and Appellate Court disagreed (Opinion p. 12). The District Court resolved the evidence against FOSTER, disregarding contrary evidence (Order, P. 5, L. 11-24). The District Court refused to consider much of FOSTER's evidence as mere "speculation"

(Order, P. 6, L. 9), refusing to enforce the rule that a litigant should normally be accorded her day in court and that summary judgment is appropriate only where there is no real triable issue of material fact after according the opposing party (here FOSTER) the benefit of all legitimate inferences. Although the Appellate Court disagreed with the District Court's determination, it failed to reverse.

The Appellate Court erred in finding that there were legitimate nondiscriminatory reasons for ARCATA's failure to consider FOSTER for the Nellis position. It based this conclusion on the fact that FOSTER had conditioned her employment on being stationed in the Monterey Peninsula area when first employed, in 1980; and in a letter requesting increased compensation, later. There is no

demonstrated logical basis for assuming, as was done here, that, because a person has a strong preference for employment in one area, that she would assert the same condition at all times in the future. Here, it was shown that many things had changed since FOSTER was first employed. (1) FOSTER had been required to work at Nellis (and Burlingame) despite her preference and was familiar with the duties; (2) ARCATA had failed to win renewal of its contract at Monterey (Fort Ord) so that FOSTER's employment there would be terminated, leaving her unemployed, if she did not accept the Nellis position; (3) ARCATA had not submitted her name and resume for the Nellis contract when she was first interviewed and asked her preference as to working location. (Indeed, ARCATA had not even obtained the Nellis contract at that time).

There was a wholly new and different set of facts and circumstances in existence when ARCATA elected its discriminatory acts. ARCATA's later excuses were mere pretext, an attempt to justify its discriminatory acts. If it believed that FOSTER would not accept the job because of location, why did it not ask her? She was working at Nellis and at the corporate headquarters at Burlingame and was readily available. The long-standing policy of ARCATA was to notify all present employees of all job openings before they were filled. This is the sole demonstrated case where they did not do so. All of this is consistent with the claim of pretext and presented factual issues, at least worthy of trial. The Appellate Court conceded that the failure by ARCATA to notify FOSTER of the opening might give rise to an inference of discrimination

(Opinion P. 13). FOSTER's declaration in opposition to the motion for summary judgment, which pointed out the changes by virtue of the passage of time and circumstances and explained her earlier preference as to location, was disregarded by the District Court as being inconsistent with prior deposition testimony. It was not. The District Court failed to consider the passage of time and changes of circumstances which, in turn, eliminated the earlier condition. The District and Appellate Courts conclude that FOSTER failed to communicate her availability for work at Nellis to ARCATA. (Opinion P. 6). This ignores the fact that FOSTER actually agreed to work at Nellis and had been working there satisfactorily for more than a year when ARCATA elected, secretly, to award her position to a younger male. She continued to work at

Nellis even after this action. Her actions effectively communicated her assent. There was no evidence of her refusal to work at Nellis.

That the Appellate Court failed to consider FOSTER's actually working at Nellis for over a year as notice to her employer of her willingness to work at that location is not left to conjecture. At Pages 15 and 16 of its Opinion, the Appellate Court states that FOSTER had to prove that "she subsequently was effective in communicating her availability for work at Nellis to the person or persons responsible for the hiring decision. This she did not do." To reach this result, the Court (1) refused to consider her counter-declaration and (2) disregarded the evidence of FOSTER's long period of acceptance of Nellis as a location for her employment. The Court cited

Radobenko v. Automated Equipment Corp., 520 F.2d 540 (9th Cir. 1975) for the proposition that a party could not "create" an issue by a declaration contrary to her deposition. The comparison is not well-taken. There was separate and distinct evidence of FOSTER's willingnesss to work at Nellis from the strongest and most credible facts, namely that she did accept and did work there for a substantial period of time.

Substantial and material portions of the facts of this case are misstated by the District Court in its Order. The following illustrate the extent and severity of these errors, which strike at the very essence of the Court's reasoning in granting summary Judgment:

(1) The Court stated that " it is unrebutted that Enus (not the defendant) had virtual sole control over hiring at

Nellis." (Order, P. 5, L. 26). This was rebutted in Exhibit "A", attached to FOSTER's initial response. In Paragraph 5 of that document, prepared by ARCATA, it is set out that authorization to hire Hamby was given to Enus by the President, Vice-President and General Counsel of ARCATA. The District Court assumed, incorrectly, and without any factual reference to the record, that "Plaintiff had submitted nothing more than her belief that Arcata had something to do with Hamby's hiring because its corporate officers had acquiesced in it as evidenced by the corporate minutes." (Order, P. 5, L. 26 - P. 6, L. 3). ARCATA's corporate minutes establish authorization, not acquiescence. They corroborate and confirm FOSTER's asertions that Enus did, in fact, have to seek authorization from ARCATA and that ARCATA, at their

Burlingame headquarters, approved the hiring.

Additionally, there was direct rebuttal by FOSTER in her declaration of February 1, 1984, in opposition to the motion (P. 1, L. 26 to P. 2, L. 6). Given the constraints on motivation and intent applicable here (Douglas v. Anderson, 656 F2d 528, 535 (9th Cir. 1981) any doubt that the hiring was the act of ARCATA should have been resolved in favor of FOSTER for purposes of summary judgment.

(2) The District Court found that "Plaintiff has set forth no evidence that she was as qualified as Hamby for the particular position." (Order, P. 5, L. 11). Such conclusion is erroneous. There is substantial evidence that FOSTER was qualified (1) for the Nellis position and (2) the responsibilities of the position FOSTER occupied entitled

her to be paid at least the same salary as Hamby. (The Equal Pay Act issue will be addressed separately below).

The facts, as set forth by FOSTER in her response (P. 2, L. 6 - 27) are that FOSTER possessed each of the specific qualifications, listed as "a through e" in ARCATA's minutes (Plaintiff's response, Exhibit "A"). FOSTER's direct assertion that she possessed the skills and experience specified for this position is entitled to consideration by the Court and is sufficient to resist a summary judgment motion. Instead, the District Court characterized this competent evidence as "unsupported assertions and speculation" (Order, P. 5, L. 14). If there was doubt as to FOSTER's qualifications, this was at least an issue to be determined at trial and not by indulging in an inference against FOSTER, which is

directly opposite to that mandated in this situation.

The nature and extent of FOSTER's qualifications and experience was detailed in her deposition, to which the Court referred in its Order (Order, P. 5, L. 9). She had 25 years' experience, mostly at high level, in administration of government contracts (FOSTER depo. P. 32, L. 9). In that same deposition, FOSTER testified to many other facts. She had experience and responsibilities other than procurement (FOSTER depo. P. 62, L. 17-24; P. 11, L. 21 - 25). In the same deposition, motive for the actions taken by ARCATA was established factually as well. FOSTER, who was working as Contract Administrator at Fort Ord and Nellis, requested an upward pay adjustment (Foster Depo. P. 33, L. 7 - 26). FOSTER's qualifications and experience were further confirmed in her

Answers to Interrogatories, filed by ARCATA in support of their motion (FOSTER Int. P. 5, L. 1-22), which also established that FOSTER had performed the Contract Administrator position for more than a year-and-a-half before Hamby was secretly hired for the same position at a salary which was $7,500 more than FOSTER was being paid (FOSTER Int. P. 5, L. 8). The job duties and responsibilities of Hamby were not different than FOSTER's, except to tne extent that FOSTER carried out greater responsibilities and duties. (Foster Depo. P. 10, L. 3 - 13).

(3) Wage discrimination as an issue requiring trial was established by evidence that FOSTER, a member of a protected class, was paid substantially less than (1) Hamby and (2) all other male employees with comparable (or lesser) qualifications and experience

(Foster Int. #22, P. 10, L. 14 - P. 11, L. 28). The District Court's conclusion that there was "no direct interaction" between Burlingame, Nellis (and Fort Ord) is unsupported by the record and contrary to FOSTER's declaration that she had, in fact, worked at all three locations for a year-and-a-half before Hamby was hired in her place (Foster Int. P. 12, L. 3-6; P. 5, L. 5-9). "Direct interaction" was also established in the dual responsibilities of others (Foster Int. P. 10, L. 20-29).

The District Court poses the question as whether FOSTER and Hamby worked in the same "establishment" and finds that they did not (Order, P. 3, L. 12 - P. 4, L. 4). The record compels a contrary conclusion. FOSTER worked at Nellis, Burlingame and Fort Ord for a year-and-a-half before Hamby was hired.

(Foster Int. P. 5, L. 7, 24-28; P. 10, L. 3-13). The duties at Nellis were the same and until after this action was filed, the title of the positions was the same. The differences were (1) FOSTER worked part-time at Nellis and (2) Hamby was paid substantially more than FOSTER for the same work.

(4) The District Court made further errors of fact in assuming that FOSTER had "conditioned her employment on remaining in Monterey such that ARCATA had no reason to believe she was interested in the Nellis position." (Order, P. 5, L. 21).

When FOSTER first applied to ARCATA, she conditioned her acceptance on working in the Monterey area (Foster depo. P. 23, L. 14-16). However, after she was employed, she agreed to travel to Nellis or Burlingame or Sacramento, whenever the need arose. (Foster depo.

P. 25, L. 14-27; P. 12, L. 6-10). FOSTER demonstrated, after hire, that she would go where ARCATA required to perform her duties.

Notwithstanding all of the foregoing facts and stated unresolved issues, the District Court determined that FOSTER was not interested in the Nellis position and that, therefore, ARCATA has articulated lawful reasons for its discriminatory actions. The District Court acknowledges that FOSTER has controverted ARCATA's motion, but dismisses the response "To the extent her declaration in opposition to this motion is to the contrary, it is disregarded." (Order, P. 5, L. 23). Such disregard of competent evidence is unwarranted.

(5) Additionally, under "Uncontroverted Facts" (P. 2, L. 16), the District Court found that Hamby had

been employed as a contracting officer for a large government contractor. This is unsupported by the record. Hamby's resume establishes that he was merely a contract administrator for a subcontractor. He was never a contracting officer.

(6) Also, under "Uncontroverted Facts" (P. 3, L. 1), the District Court declares that "The EEOC found no basis for her claim . . ." There was no basis for this finding. In fact, the EEOC did find discrimination in FOSTER's case. As the result of the EEOC findings, ARCATA offered, and FOSTER accepted, a position at Nellis in February 1983. (The offer was communicated through the EEOC). Later, FOSTER resigned as the result of retaliatory treatment on the part of ARCATA.

In determining that FOSTER was not entitled to the protection of the Equal

Pay Act, 29 U.S.C. Para. 206(d)(1)(1982), the Appellate Court overlooked the following facts, which distinguish this case from the cases cited in the Opinion:

(1) This was not a nationally-operated business with many establishments spanning the nation. Three of the four operations were located in California (Burlingame, Monterey, and Sacramento) and one (Nellis) was almost contiguous with the California border.

(2) Management was centralized at Burlingame. Corporate policy emanated from Burlingame for all operating locations. Even the employment of Hamby was approved from Burlingame. Enus' authority came from Burlingame and he demonstrated, by requesting approval of the hire, that he did not head an independent establishment.

(3) FOSTER, with a single rate of pay, worked in each of the four locations. If there was a legitimate differential in pay rates, based on Nellis being a separate establishment, this was not recognized in FOSTER's prior pay rates. It was only after Hamby's hire that this "separate establishment" claim arose. The fact that FOSTER, who was then performing duties at several locations simultaneously, was listed as the person who would continue to perform the Contract Administrator duties at Nellis in the employer's contract proposal, is further evidence, overlooked by the Appellate Court in its Opinion, that Nellis was integrated into ARCATA's corporate structure, headquartered in Burlingame. It should be decisive that FOSTER herself was assigned to Nellis by Burlingame.

When these facts are considered, the circumstances fall within the rationale of Grumbine v. U. S. (1984) 586 F. Supp. 1144.

CONCLUSION

The sole ultimate question for determination on a motion for summary judgment is whether there are genuine issues of material fact. If they are demonstrated, summary judgment cannot be substituted for the more complete and searching analyses of trial.

The Appellate Court found that FOSTER had demonstrated that she is a member of a protected class, based on both age and sex. It disagreed with the District Court and determined that she had succeeded in raising an issue of fact on her qualification for the Nellis position. It is beyond argument that there was pay discrimination against FOSTER and that she was prejudicially

affected by the employer's decision (1) not to notify of the job opening and (2) to hide the position from her until after it was filled. These facts, which are not considered or distinguished in the Court's Opinion, at least raise issues of fact, requiring trial, as does the issue of whether Nellis was a "separate establishment" permitting a pay differential which would, otherwise, be a prohibited discrimination.

DATED: January 15, 1986

Respectfully submitted,

SAUL M. WEINGARTEN, INC.
Attorneys for Petitioner

By _____
SAUL M. WEINGARTEN

APPENDIX

APPENDIX "A"

FILED
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WILLIAM L. WHITTAKER
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U.S. DISTRICT COURT
NO.DIST.OF CA., S.J.

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LYNN FOSTER,	) NO.C-83-20084 WAI
Plaintiff,	) ORDER
v.	)
ARCATA ASSOCIATES, INC.,	)
Defendant.	)

Defendant Arcata Associates, Inc. ("ARCATA") moves for summary judgment in this action for sex, age and wage discrimination under Title VII (42 U.S.C. S 2000(e) et seq.), the Age Discrimination in Employment Act ("ADEA")(29 U.S.C. Sec. 621(d)), the Equal Pay Act (29 U.S.C. Sec. 206(d)), and 42 U.S.C. Sec. 1981.

I. UNCONTROVERTED FACTS

Plaintiff Lynn Foster is a 58-year old woman who had been employed from October 1980 through the end of 1982 as a contract administrator at Arcata's offices in Monterey, California. Arcata is a government contractor which manages and performs various testing and services for the military at, in this case, Fort Ord, in Monterey, and Nellis Air Force Base, near Las Vegas, Nevada. Plaintiff had resided in Monterey with her husband, a retired naval officer also employed by Arcata, prior to joining Arcata. She has a college degree in Business Administration. Her starting annual salary was between $27,000 and $28,000.

In 1981, Arcata hired James Enus as a Project Manager for its Nellis contract. Enus was given full authority to hire personnel subject

only to budgetary constraints. In April, 1982, Enus decided to hire an assistant capable of managing performance of the Nellis contract. He interviewed and hired Bill Hamby. Hamby was to be stationed in Las Vegas. His starting salary was about $37,000. Hamby had been a Weapons Systems officer in the Air Force and had been an operations officer at Nellis. Hamby had a degree in Public Administration and had been employed as a contracting officer for a large government contractor. At the time of Hamby's hiring, plaintiff's salary was $30,000.

In June, 1982, Arcata was out-bid as to its Fort Ord contract. All operations were to be phased out by January, 1983. Plaintiff was interviewed and offered a position by Arcata's successor but did not accept the position as its hours did not meet

her needs. Plaintiff's husband accepted a position with Arcata's successor. Plaintiff was notified of her termination effective in January, 1983, in September. She filed a complaint with the EEOC in November, 1982, charging sex and age discrimination for not having been offered Hamby's job and that she should have received at least Hamby's salary for her job. The EEOC found no basis for her claim and issued its Notice of Right to Sue on April 26, 1983. This action was filed June 22, 1983.

II. DISCUSSION

A. 42 U.S.C. Sec. 1981 Claim

Plaintiff's Sec. 1981 claim is DISMISSED as wholly without merit. Section 1981 relieves only racial discrimination, White v. Washington Public Power Supply System, 692 F.2d 1286 (9th Cir. 1982), and there are

neither allegations nor evidence to support this claim.

B. Equal Pay Act Claim

The question presented is whether plaintiff and Hamby worked in the same "establishment." The Supreme Court has held that establishment means a distinct physical place of business. Phillips v. Walling, 324 U.S. 490, 496 (1944). That definition was adopted by the Secretary of Labor at 29 CFR 800.103, 108 (1976). See Gerlach v. Michigan Bell Tel. Co., 448 F. Supp. 1168, 1172 (E.D. Mich. S.D. 1978). Recent authority indicates its application is ad hoc. See, e.g., Alexander v. University of Michigan-Flint, 509 F.Supp. 627, 629 (E.D. Mich. S.C. 1980).

In this case, Arcata maintains its corporate headquarters in Burlingame, California, through which both contracts

were apparently negotiated. However, day-to-day operations and contract performance is conducted at each of the field offices located near the military bases with no direct interaction between the two. Cf., Alexander, supra (individual campuses of University of Michigan system held separate "establishments" despite cental university policy offices). The court therefore concludes that the Nellis and Ford Ord offices are distinct and separate establishments such that no Equal Pay Act claim may be made as a matter of law.

C. Sex and Age-based Discrimination Claims

Under the ADEA and Title VII, courts apply a three-part analysis: 1) plaintiff must establish a prima facie case of discrimination; 2) defendant may rebut the claim with evidence of

legitimate, non-discriminatory justification for its alleged misconduct; 3) plaintiff may rebut defendant's justification as a pretext of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)(ADEA); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)(Title VII).

As to the ADEA claim, plaintiff must submit evidence that age was a "determining factor" in defendant's adverse decision. Steckl v. Motorola, Inc., 703 F.2d 392 (9th Cir. 1983). An inference of age discrimination arises where plaintiff is within the protected class, has applied for an available position for which he or she is qualified and is denied the position which was instead given to a younger person. Id., at 393.

Plaintiff herein is clearly within

the protected class. There is some dispute as to whether Hamby's job was available to her. She contends it was kept secret from her; defendant contends it had nothing to do with establishing the position but that, at any rate, it needed to keep plaintiff in Monterey for its business and her personal reasons such that it did not believe she would be interested. The court obviously must resolve conflicting inferences in favor of plaintiff and cannot rest summary judgment on the availability issue.

However, the bigger question is whether plaintiff was qualified for the Nellis position. Enus needed someone with a technical background and familiarity with Nellis weapons systems and procedures and someone who could provide close liason with the Air Force. Hamby had been providing similar

functions for another government contractor. (Enus decl. paras. 4-7.) Plaintiff had 20 years of government experience (Foster depo. 61:15-23), limited solely to procurement (Foster depo. 11:28).

Plaintiff has set forth no evidence that she was as qualified as Hamby for the particular position. She merely asserts that Hamby was chosen because he was younger and that she was just as qualified. Unsupported assertions and speculation are insufficient to support her position. The inference is that plaintiff was not qualified for the Nellis position.

Even assuming plaintiff has made out a prima facie case of age discrimination, the court finds that defendant has articulated legitimate, lawful reasons for its actions. From plaintiff's own admission and by her

employment demands, plaintiff had conditioned her employment on remaining in Monterey such that Arcata had no reason to believe she was interested in the Nellis position. To the extent her declaration in opposition to this motion is to the contrary, it is disregarded. Radobenko v. Automated Equipment Corp., 520 F. 2d 540, 543-544 (9th Cir. 1975). Moreover, it is unrebutted that Enus had virtual sole control over hiring at Nellis. Plaintiff has submitted nothing more than her belief that Arcata had something to do with Hamby's hiring because its corporate officers had acquiesced in it as is evidenced by corporate minutes. The court is mindful that summary judgment is only reluctantly granted concerning questions of motivation and intent. Douglas v. Anderson, 656 F.2d 528, 535 (9th Cir. 1981). However, plaintiff has failed to

proffer any evidence worthy of weighing and the court does not intend to promote judicial review of general business decisions based upon plaintiff's speculation.

As to the sex discrimination claims, the same result applies. As discussed above, plaintiff has dubiously set forth her prima facie qualifications for the Nellis position. Cf. Heyman v. Tetra Plastics, 640 F.2d 115 (8th Cir. 1981). Defendant has provided legitimate, lawful business reasons for its failure to hire her. Plaintiff has set forth no evidence of pretextual motivation.

Plaintiff has also failed to provide any evidence of violation of the so-called "comparable worth" requirements of Title VII. See, eg., Kouba v. Allstate Ins. Co., 523 F. Supp. 148 (N.D. Cal. 1981). Plaintiff must

set forth some objective evidence of intentional wage discrimination on the basis of her sex, Id., and she has failed to do so.

III. CONCLUSION.

Accordingly, there are no triable issues of material fact as to any of plaintiff's claims for relief. Summary judgment is therefore GRANTED and this action is DISMISSED with judgment entered in favor of defendant with each party to bear his or her own costs.

DATED: 6 13 84

/s/

WILLIAM A. INGRAM
United States District Judge

FILED
JUN 13 9 18 AM '84
WILLIAM L. WHITTAKER
CLERK
U.S. DISTRICT COURT
NO.DIST.of CA., S.J.

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LYNN FOSTER,	) NO.C-83-20084 WAI
Plaintiff,	) JUDGMENT
v.	)
ARCATA ASSOCIATES, INC.,	)
Defendant.	)

In accordance with the accompanying order,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this action is DISMISSED.

DATED: 6 13 84

/s/

WILLIAM A. INGRAM
United States District Judge

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LYNN FOSTER,
Plaintiff-Appellant,
v.
ARCATA ASSOCIATES, INC.,
Defendant-Appellee.

No. 84-2218
D.C. No.
C-83-20084 WAI
OPINION

Argued and Submitted
March 15, 1985—San Francisco, California

Filed October 2, 1985

Before: J. Clifford Wallace and Cecil F. Poole, Circuit Judges, and Albert Lee Stephens* District Judge.

Opinion by Judge Poole

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding

SUMMARY

Employment Discrimination

Appeal from grant of summary judgment in favor of an employer on claims of sex and age discrimination, and violation of the Equal Pay Act. Affirmed.

Foster—a fifty-eight year old woman—was employed by Arcata as a corporate contracts administrator. Arcata's main

*Honorable Albert Lee Stephens, Senior United States District Judge for the Central District of California, sitting by designation.

office was in Burlingame, California, but it had two branch offices: one at Nellis Air Force Base in Las Vegas, Nevada, and the other at Fort Ord in Monterey County, California. Foster was stationed at the Monterey office pursuant to her express request when she was hired. In August 1981, Hamby was hired as a contract compliance manager for a contract with the Air Force at Nellis. Arcata lost the Fort Ord contract in July 1982 and Foster was notified in September of that year that her termination would be effective the next January. In November of 1982 she filed a complaint with the Equal Employment Opportunity Commission (EEOC), charging sex and age discrimination because she had not been offered Hamby's job in Nevada, and had not been paid the same salary as Hamby for her work on the Fort Ord contract. Although she was subsequently hired for work on the contract at Nellis at the same salary as Hamby, she resigned after six weeks due to alleged hostility resulting from her lawsuit.

Foster filed suit after the EEOC issued a Notice of Right to Sue. She charged sex and age discrimination in violation of Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Equal Pay Act, and the 1866 Civil Rights Act.

[1] In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court set forth the basic allocation of burdens and the order of proof for Title VII cases alleging disparate treatment. A plaintiff must first make out a prima facie case of discrimination. If the plaintiff succeeds, the duty of going forward shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment decision. If the defendnt is successful, the responsibility then reverts to the plaintiff to negate the defendant's excuse by showing that the proffered reason is but a pretext for discrimination. [2] Under this analysis, Foster demonstrated that she was a member of a protected class based on her age and sex. [3] She also succeeded in raising an issue of fact concerning whether she was qualified for the position at Nellis. [4] The issue of whether Foster's failure to apply for the position is fatal to her prima facie case need not be

reached because consideration of the second and third prongs of the *McDonnell* test is dispositive of the issue.

Arcata alleges three nondiscriminatory reasons for its decision to hire Hamby for the Nellis position: [5] Foster was not considered because she had previously communicated a willingness to work only in Monterey; [6] she was not qualified for the position or Hamby was better qualified for the position; and [7] sound business judgment was the basis for the decision because Foster could not have been spared from her job in Monterey.

[8] Foster failed to raise an inference that Arcata's proffered reason for hiring Hamby was pretextual because she did not present evidence sufficient under F. R. Civ. P. 56 to indicate that despite her original expression of a willingness to work only in Monterey, she was subsequently effective in communicating her availability for work at Nellis to the person or persons responsible for hiring decisions.

[9] The Equal Pay Act prohibits an employer from engaging in sex-based wage discrimination by paying different sexes within any establishment for jobs that require substantially equal skill, effort and responsibility, and which are performed under similar working conditions. [10] Foster has failed, as a matter of law, to produce facts sufficient to indicate that the Nellis and Fort Ord offices are the same under the Equal Pay Act. [11] She also failed to articulate specific facts demonstrating that male employees who worked within the same establishment as she, performed substantially equal work for which they were paid more.

[12] Likewise, she failed to set forth evidence sufficient to establish a prima facie case of intentional wage discrimination based on Title VII. [13] Even though she was paid less than Hamby, her claim cannot succeed because the responsibilities of their positions were not substantially equal. [14] Nor did she set forth a prima facie case of intentional wage discrimination because of her age in violation of ADEA.

[15] Finally, because Foster did not apply for a continuance or other appropriate discovery order, the district court did not abuse

its discretion in proceeding to summary judgment when discovery had not been completed.

COUNSEL

Saul M. Weingarten, Seaside, California, for the plaintiff-appellant.

Pillsbury, Madison & Sutro, Michael Salinsky, John C. Cook and Christopher W. Katzenbach, San Francisco, California, for the defendant-appellee.

OPINION

POOLE, Circuit Judge:

Appellant Lynn Foster appeals the district court's grant of summary judgment in favor of Arcata Associates, Inc., (Arcata) on Foster's claims of (1) sex discrimination under Title VII, (2) age discrimination under the ADEA, and (3) violation of the Equal Pay Act. Foster's claims arose out of Arcata's failure to offer her a position in its office near Las Vegas, Nevada, when the company was forced to phase out its office in Monterey, California, where appellant was employed, and its failure to pay Foster a salary equal to that paid the person whom Arcata hired for the position. We affirm.

I.

FACTS

Appellant, a fifty-eight year old woman, was hired in October 1980 as Corporate Contracts Administrator by Arcata, a corporation that provides scientific, engineering, and facilities management support to the government and professional services companies. During the time of appellant's employment until she

resigned in April 1982, Arcata's corporate offices were located in Burlingame, California. The company also maintained two field offices in connection with separate services contracts awarded by the United States Army and Air Force. One office was at Fort Ord in Monterey County, California, and the other at Nellis Air Force Base in Las Vegas, Nevada. Although a member of the corporate staff, appellant was stationed at Arcata's Monterey office, pursuant to her express request when she was hired.

Appellant has a college degree in Business Administration, certificates in government contracting, and approximately twenty-five years civil service experience in government contracting. She was hired by Arcata at a starting salary of between $27,000 and $28,000 per year, which was approximately $10,000 less than she had been earning in her previous job with the Department of Energy. As Corporate Contracts Administrator, Foster was responsible for the management of all of Arcata's government contracts.

In August 1981, Arcata hired James Enus as Project Manager for its contract with the Air Force at Nellis Air Force Base. Enus was given full authority to hire personnel subject only to budgetary constraints. The following April, Enus reorganized the Nellis staff and subsequently hired Bill Hamby as Contract Compliance Manager to be responsible for the day to day operations of the Air Force contract. Hamby had been a weapon systems officer in the Air Force and an operations officer at Nellis. He had received a Master's degree in Public Administration and was employed as a contracting officer for a large government contractor. Hamby was hired at a starting salary of about $37,000 per year.

At the time the decision was made to hire Hamby, appellant was involved in the preparation of a proposal for the renewal of the Fort Ord contract. Her salary, due to a recent adjustment, was $30,000 per year.

Arcata lost its Fort Ord contract in July 1982, and in September, appellant was notified of her termination to be effective in January 1983. In November, Foster filed a complaint with the

Equal Employment Opportunity Commission (EEOC), charging sex and age discrimination because she had not been offered Hamby's job in Nevada, and had not been paid Hamby's salary for her work on the Fort Ord contract.

Appellant continued her employment through the end of the year and was instrumental in phasing out the company's operations in Monterey and phasing in Arcata's successor. Like most Arcata employees who lost their jobs when the Fort Ord contract was not renewed, appellant and her husband, a retired naval officer who was also an employee, were offered positions by the successor. Foster's husband accepted the offer, but she refused because the hours did not meet her needs.

In February 1983, however, Arcata hired Foster as Assistant to the Program Manager for the Nellis Air Force Base contract at a salary of $37,500 per year, the same as Hamby was receiving. After only six weeks, appellant resigned due to what she claimed were incidents of hostility resulting from her lawsuit.

On April 25, 1983, the EEOC issued to appellant a Notice of Right to Sue. This lawsuit was filed on June 22, 1983, charging sex and age discrimination in violation of Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 623), the Equal Pay Act (29 U.S.C. § 206(d)), and the 1866 Civil Rights Act (42 U.S.C. § 1981). Appellant requested back pay, damages, attorney's fees and costs.

On January 11, 1984, Arcata moved for summary judgment. The district court granted the motion on June 13, 1984, finding:

> (1) Appellant's claim of age and sex discrimination failed to state a claim under 42 U.S.C. § 1981, which prohibits only race discrimination.
>
> (2) Appellant's Equal Pay Act claim failed because appellant did not show that Arcata's separate offices near Fort Ord and Nellis Air Force Base were "the same establishment."

(3) Appellant did not meet her burden of establishing a prima facie case of sex or age discrimination by producing evidence that she was qualified for Hamby's position. Moreover, even if she had met her burden, Arcata demonstrated legitimate nondiscriminatory business reasons for not offering her the Nellis job.

(4) Appellant failed to produce objective evidence of intentional wage discrimination to support her Title VII claim.

Foster does not appeal the district court's ruling on her § 1981 claim, but contends that the trial court incorrectly resolved against her certain material issues of fact when it granted summary judgment on the other issues.

We consider first, in Part II, Foster's claims of unlawful discrimination in hiring. We turn in Part III to her claims of wage discrimination in hiring. Finally, in Part IV, we consider her discovery claim.

II.

CLAIMS OF DISCRIMINATORY HIRING: TITLE VII AND ADEA

Plaintiffs alleging discrimination under Title VII and the ADEA may proceed according to either of two theories: disparate treatment or disparate impact. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 1854-55 n.15 (1977) (Title VII); *Sakellar v. Lockheed Missiles & Space Co.*, No. 83-2701, slip op. at 5-8 (9th Cir. July 19, 1985) (ADEA); *Casillas v. United States Navy*, 735 F.2d 338, 342 (9th Cir. 1984) (Title VII); *Equal Employment Opportunity Commission v. Borden's, Inc.*, 724 F.2d 1390, 1392 (9th Cir. 1984) (ADEA). The disparate treatment theory is appropriately employed by aggrieved employees claiming that they were intentionally treated less favorably because of their race, color, religion, sex, or national origin under Title VII,

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949 (1978) (quoting *Teamsters*, 431 U.S. at 335 n.15), or because of their age under the ADEA, *Borden's*, 724 F.2d at 1392. Proof of discriminatory motive is required under a disparate treatment theory, although such motive may be inferred in some situations from the mere fact of differences in treatment. *Teamsters*, 431 U.S. at 335 n.15, 97 S.Ct. at 1854 n.15. In contrast, disparate impact cases typically involve employment practices which, although facially neutral, fall more harshly on one group than another and cannot be justified by business necessity. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 713 n.1, 103 S.Ct. 1478, 1481 n.1 (1983); *Teamsters*, 431 U.S. at 335 n.15, 97 S.Ct. at 1855 n.15; *Casillas*, 735 F.2d at 342.

[1] Foster does not argue discrimination on the basis of disparate impact; she claims that Arcata intentionally deprived her of an employment opportunity because of her sex and age. In the leading case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), the Supreme Court set forth the basic allocation of burdens and the order of proof for Title VII cases alleging disparate treatment. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093 (1981). The same analysis applies to disparate treatment claims arising under the ADEA. *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983); *Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981). Under *McDonnell Douglas*, the plaintiff, who bears the burden of persuading the trier of fact by a preponderance of the evidence that there has been discrimination, must first make out a prima facie case of discrimination. If the plaintiff succeeds, the duty of going forward shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment decision. Should the defendant succeed in articulating a nondiscriminatory explanation, the plaintiff's advantage is neutralized and the responsibility then reverts to plaintiff to negate the defendant's excuse by showing that the proffered reason is but a pretext for discrimination. This responsibility of preponderating merges with the plaintiff's ultimate burden which is to persuade the court that she has been a victim

of intentional discrimination. 411 U.S. at 802-04, 93 S.Ct. at 1824-25; *Aikens*, 460 U.S. at 715, 103 S.Ct. at 1481-82; *Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1080, 1093; *Hagans v. Clark*, 752 F.2d 477, 481 (9th Cir. 1985). The fact finder must then resolve any ultimate factual dispute about whether the defendant's conduct was discriminatory within the meaning of Title VII. *Aikens*, 460 U.S. at 715, 103 S.Ct. at 1482; *Wall v. National Railroad Passenger Corporation*, 718 F.2d 906, 909 (9th Cir. 1983).

On a motion for summary judgment in discrimination cases, the *McDonnell Douglas* order of proof and shifting of burdens must be viewed in light of the traditional test for granting summary judgment. *See Steckl*, 703 F.2d at 393. That test is whether the moving party has demonstrated that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Alaska v. United States*, 754 F.2d 851, 853 (9th Cir. 1985). Although courts are generally cautious about granting summary judgment when motivation and intent are at issue, as in Title VII and ADEA cases, such relief may nonetheless be appropriate. *Steckl*, 703 F.2d at 393. One purpose of the allocation of burdens in Title VII and ADEA actions is to enable the district courts to identify meritless suits and dispense with them short of trial. *Id.*, at 393-94; *Anderson*, 656 F.2d at 535. Summary judgment, judiciously applied, is an appropriate vehicle for accomplishing this objective.

The task of this court when reviewing the grant of summary judgment is identical to that of the trial court. We must determine *de novo*, while viewing the evidence in the light most favorable to the appellant, whether Arcata has demonstrated the absence of any genuine issues of material fact and its entitlement to judgment as a matter of law. *Alaska*, 754 F.2d at 853.

A. Prima Facie Case of Discrimination

To establish a prima facie case of intentional discrimination sufficient to survive a motion for summary judgment, appellant must identify actions by Arcata that if unexplained, give rise to

an inference of discriminatory conduct. *Furnco*, 438 U.S. at 576, 98 S.Ct. at 2949; *Teamsters*, 431 U.S. at 358, 97 S.Ct. at 1866. Foster is not required to prove her prima facie case by a preponderance of the evidence on motion for summary judgment. At this stage of the proceedings, the district court cannot try issues of fact or resolve them in favor of one party or the other. Rather, the court may only determine whether the plaintiff has produced evidence sufficient to support a reasonable inference of the existence of the fact at issue.[1] Hence, appellant need only adduce facts which, if believed, could generate the inference that she was probably denied the job opportunity at Nellis because Arcata applied discriminatory age or sex criteria in its decision to fill the position. *See Steckl*, 703 F.2d at 393. Mere assertions of discriminatory motive and intent, however, are inadequate. *Id.* A party opposing summary judgment must, in a manner "as would be admissible in evidence," set forth "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The facts that a plaintiff must assert to raise an inference of discrimination under Title VII and the ADEA have not been predetermined. In *McDonnell Douglas*, the Supreme Court identified one appropriate model for establishing a prima facie case of disparate treatment.[2] The Court, however, has repeatedly noted that the *McDonnell Douglas* four-part test is neither exclusive

[1] In *Burdine*, the Court noted that *McDonnell Douglas* should have made it apparent that in the Title VII context, "prima facie case" is used to denote the establishment of "a legally mandatory, rebuttable presumption," rather than to "describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue." In the context of a motion for summary judgment, however, "prima facie case" does refer to the plaintiff's burden of production.

[2] The disparate treatment model for a prima facie case of discrimination described by the Supreme Court in *McDonnell Douglas* required the plaintiff to show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802 (footnote omitted).

nor rigid, and that the facts sufficient to raise an inference of discrimination necessarily will vary depending upon the situation. *McDonnell Douglas*, 411 U.S. at 802 n.13, 93 S.Ct. at 1824 n.13; *Burdine*, 450 U.S. 253 n.6, 101 S.Ct. at 1093 n.6; *Furnco*, 438 U.S. at 575-76, 98 S.Ct. at 2949.

[2] In this case, appellant demonstrated that she is a member of a protected class based on her age (fifty-five at the time Arcata hired Hamby) and sex (female). She also succeeded in raising an issue of fact concerning whether she was qualified for the position at Nellis. We disagree with the district court on this point. The district court inferred that Foster was not qualified for the Nellis position because she produced no evidence that she was *as qualified* for the position as Hamby. In the context of a prima facie case of discrimination on motion for summary judgment, however, Foster was required only to produce evidence sufficient to indicate a genuine factual dispute about whether she possessed the *minimum* qualifications for the job, not whether she was as qualified or more so than the person whom Arcata selected. A review of the record has convinced us that the appellant met this requirement.

The district court found that James R. Enus, who was employed by Arcata as the Program Manager for the Nellis Air Force Base contract, created the position of Contract Compliance Manager because of his perceived need for a person with a technical background and familiarity with Nellis weapons systems and procedures who could provide close liaison with the Air Force. This conclusion is supported by the declarations of Enus and Buck Wong, Chief Executive Officer of Arcata, in support of Arcata's motion for summary judgment, and by Wong's deposition testimony. In his declaration, Enus stated that he considered Hamby "uniquely qualified" for the position. Hamby possessed experience as a weapon systems officer in the Air Force and had been employed as an operations officer for a large government contractor approximately three years. In addition, he had earned a Master's degree in Public Administration.

Appellant, in contrast, was never a member of the armed forces, but she did have approximately twenty-five years of gov-

ernment contracting experience, mostly high level. In her deposition and subsequent declaration in opposition to Arcata's motion for summary judgment, Foster states facts which, if true, could justify an inference that she was qualified for Hamby's position. For example, appellant claims that she had been performing all contractual functions for both the Nellis and the Fort Ord projects for one-and-one-half years in her position as Corporate Contracts Administrator, and that Hamby was hired to do the same work, but on a smaller scale. Nonetheless, Hamby, younger and a man, was hired at a salary approximately $7500 more than she was receiving. Appellant also asserted that after she filed her discrimination complaint in November 1982, Hamby's job title was changed to give the impression of additional responsibility. She challenged Arcata's contention that her government contracting experience was limited solely to procurement, and submitted her resume of qualifications as proof that her expertise was of a larger scope than Arcata described. Appellant argued that the fact that Arcata submitted her name and resume as part of its proposal for the Nellis contract, further indicates her qualification for the position.

[3] Appellant thus satisfied her burden of presenting evidence sufficient to generate a genuine issue of material fact about her qualification for the Nellis position. The disputed factual issues are whether the position filled by Hamby required technical expertise and whether she possessed the requisite qualifications for that position. Such factual issues may not be resolved in favor of the moving party on summary judgment when, as here, the adverse party has supported its position by evidentiary materials as provided in Rule 56. It is enough that these materials consist of the party's own sworn deposition testimony and declaration in opposition to the motion for summary judgment.

In *McDonnell Douglas*, the court required the plaintiff to demonstrate not only that he was qualified for the job opportunity he was denied, but also that he applied for that job. Foster admits that she did not apply for Hamby's job. She claims, however, that the reason she did not apply was because the job opening was intentionally kept secret from her. Arcata denies appellant's

claim of secrecy, but does not challenge her contention that she was not made aware of the opening.

[4] We need not reach whether Foster's failure to apply for the job position is fatal to her prima facie case. Even if the failure by Arcata to notify Foster of the opening might give rise to an inference of discrimination consistent with the other inferences we have found, our consideration of the second and third prongs of the *McDonnell* test is dispositive of this issue.

B. Legitimate Nondiscriminatory Reasons

[5] Arcata alleges three nondiscriminatory reasons for its decision to hire Hamby for the Nellis position. First, the company contends that Foster was never considered for the position because she had previously communicated a willingness to work only in Monterey. This claim finds support in Foster's own deposition testimony in which she stated that when Arcata interviewed her in October 1980, she conditioned her employment on being stationed in the Monterey Peninsula area. In a letter to Buck Wong in June 1981 pertaining to an increase in her level of compensation, appellant confirmed that she would accept a position only in Monterey. That letter also stated that appellant had agreed to travel back and forth to Nellis or Burlingame despite the personal hardships that such travel would cause.

Buck Wong's declaration in support of Arcata's summary judgment motion is consistent with Foster's deposition testimony. Wong stated that when Foster was hired, she "made it clear" that she would accept the position only if stationed in Monterey. Wong also stated that he agreed to that arrangement, although Foster was on the corporate staff and the company's corporate headquarters were located in Burlingame, in return for Foster's acceptance of a $28,000 per year salary. James R. Enus, whom Wong claims was solely responsible for hiring Hamby, stated in his declaration that he was unaware that Foster wished to be considered for the position. Enus said that Foster "never expressed any interest in filling the position filled by Mr. Hamby, nor did she ever indicate to me any desire to relocate to Nellis. I never considered Ms. Foster as a candidate for the job * * *."

[6] Second, Arcata claims that its decision was nondiscriminatory because Foster was not qualified for the position, or at least if she did have the minimum qualifications, Hamby was the more qualified candidate.

[7] Third, the company contends that when the decision was being made to hire a Contract Compliance Manager at Nellis, Foster could not have been spared from her work in Monterey because she was an integral part of the team responsible for preparing the Fort Ord contract proposal. Thus, sound business judgment was the basis for its hiring decision.

We are satisfied that Arcata met its burden of articulating a legitimate, nondiscriminatory reason for not considering or hiring Foster for Hamby's position. Having found that Arcata stated facts which, if true, were sufficient to rebut the inference of discrimination, the burden now returns to Foster to demonstrate that Arcata's explanation was but a pretext. *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093; *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1285.

C. Pretext

Appellant challenges Arcata's claim that she was not considered for the job at Nellis because she had made herself unavailable by communicating her intention only to work in Monterey. In her declaration in opposition to Arcata's motion for summary judgment, appellant stated that she only expressed a *preference* for working in Monterey, and not that she would refuse employment elsewhere. This statement contradicted her prior deposition testimony that she conditioned her employment on being located in Monterey, and that the condition was repeated in her June 1981 letter to Buck Wong. Foster characterized the purpose of her letter to Wong as an effort to "clear the air and bring to Wong's attention the inequities [in her salary] and not to confirm that I would only work in Monterey." Foster stated that

> Arcata knew I needed and wanted to work, and assigned me to jobs in Nellis, Sacramento and Burlin-

> game. I expressed interest in working at Burlingame and Nellis if I were properly compensated. These discussions were held with Barnett and Smothers, both Vice Presidents of Arcata.

Appellant also contends that she expressed an interest in the Nellis position by the fact that she had been responsible for management of the Nellis contract and had worked at Nellis when required during 1980-82.

The district court disregarded appellant's declaration in opposition to the motion for summary judgment to the extent that it was contrary to her deposition testimony, based on our decision in *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540 (9th Cir. 1975). In that case, this court refused to permit the appellant to create his own issue of fact by an affidavit contradicting his prior deposition testimony. We quoted a decision by the Second Circuit in which that court noted:

> [I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

520 F.2d at 544 (quoting *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)).

We agree with the district court that *Radobenko* is apposite. Appellant's declarations that she only expressed a *preference* for working in Monterey and did not *refuse* to work elsewhere are in direct contradiction with her deposition testimony that she conditioned her initial employment on being in Monterey and continued to adhere to that condition in June 1981. Consequently, we consider as credible only appellant's deposition testimony on this subject. Thus, for appellant to raise an inference that Arcata's proffered reason for hiring Hamby was pretextual, she must present evidence sufficient under Rule 56 to indicate that, despite her

original expression of a willingness to work only in Monterey, she subsequently was effective in communicating her availability for work at Nellis to the person or persons responsible for the hiring decision. This she did not do.

The uncontradicted record shows that Enus was responsible for hiring Hamby, and appellant failed to articulate facts indicating that Enus was aware that she was interested in the position. Buck Wong testified in his deposition, and both he and Jim Enus stated in their declarations, that Wong, as Chief Executive Officer of Arcata, had delegated to Enus full authority to hire staff in connection with the Nellis contract, subject only to budgetary constraints. Appellant challenged these statements by Wong and Enus by charging that Enus was required to, and did, obtain Wong's approval for his decision to hire Hamby.

Although Enus stated in his declaration that he met with Wong, Barnett, and Smothers to discuss his reorganization plan and the importance of having an on-site assistant at Nellis, he also stated

> * * * I was not specifically instructed to hire Mr. Hamby or anyone else. It was my understanding that I could use my own judgment in hiring an assistant, and that my only constraint was to stay within the contract budget. At no time during the meeting did we discuss Lynn Foster's age or sex, or discuss Ms. Foster in any manner at all regarding a relocation to Nellis AFB.

Enus further stated that Foster never expressed any interest in filling Hamby's position nor did she indicate to him any desire to relocate to Nellis. Consequently, Enus did not even consider Foster for the position. Appellant has not produced any evidence to indicate otherwise.

Appellant attempts to argue that since she had told Smothers and Barnett that she was available for work at Nellis, this communication was sufficient to create an inference that she was considered and rejected because of her age and sex. This argument

fails, however, because appellant did not present facts showing that Smothers or Barnett ever communicated this information to Enus or Wong. Both Enus and Wong denied any knowledge of such information. Moreover, appellant produced no evidence to contradict the statements of Wong and Enus indicating that Enus and Enus alone, selected Hamby.

[8] We conclude that the reason Foster was not considered for Hamby's position was not due to any discriminatory animus based on her age or sex but rather, because she failed to make her availability for work at Nellis known to Enus or Wong. Title VII does not require an employer to monitor continuously the job-related desires and preferences of its employees. Employers have no obligation to canvass their employees for preference changes before filling job openings, as appellant in effect argues. Employees must assume responsibility for making application for positions when the position openings are known. In cases where, as here, the job opening was not announced, then the employee must demonstrate that the employer was aware of her availability for the position. To survive a motion for summary judgment, the employee is required to articulate specific facts indicating that despite the employer's awareness of her job availability, she was not hired because of impermissible considerations under Title VII and the ADEA. Foster failed to meet this burden by presenting facts showing that Arcata's legitimate nondiscriminatory reason for not hiring her, which was her stated position of unavailability for the job, was pretextual.

Because Foster failed to produce evidence from which we could infer that Arcata's reason for not considering her was pretextual, we need not address whether pretext was demonstrated in connection with Arcata's other claimed reasons. Accordingly, we affirm the decision of the district court on this issue.

III.

CLAIMS OF DISCRIMINATORY WAGES: EQUAL PAY ACT, TITLE VII, AND ADEA

A. Equal Pay Act

[9] Appellant also challenges the district court's dismissal of her claim under the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982).[3] That statute prohibits an employer from engaging in sex-based wage discrimination by paying different wages to employees of different sexes within any establishment for jobs that require substantially equal skill, effort and responsibility, and which are performed under similar working conditions. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228 (1974); *Spaulding v. University of Washington*, 740 F.2d 686, 696-699 (9th Cir.), *cert. denied*, 105 S.Ct. 511 (1984); *Equal Employment Opportunity Commission v. Maricopa County Community College District*, 736 F.2d 510, 513 (9th Cir. 1984); *Hein v. Oregon College of Education*, 718 F.2d 910, 913 (9th Cir. 1983); *Gunther v. County of Washington*, 623 F.2d 1303, 1309 (9th Cir. 1979), *aff'd on other grounds*, 452 U.S. 161 (1981). The district court determined that appellant was precluded as a matter of law from succeeding on her Equal Pay Act claim because Arcata's Nellis and Fort Ord offices were distinct and separate establishments. We review the court's grant of summary judgment on this basis *de novo* and affirm.

[3] The Equal Pay Act, 29 U.S.C. § 206, provides in relevant part:

> (d)(1) No employer having employees subject to any provisions of this section [of the Fair Labor Standards Act] shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

The term "establishment" is not expressly defined in the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982); however, the Supreme Court has held that it refers to a "distinct physical place of business," as opposed to an entire business or enterprise. *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496, 65 S.Ct. 807, 808 (1945) (construing "retail establishment" exemption of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(2)). This interpretation was adopted by the Secretary of Labor for purposes of administering the Equal Pay Act. 29 C.F.R. 800.108 (1982); *Jacobson v. Pitman-Moore, Inc.*, 573 F.Supp. 565, 568 (D. Minn. 1983); *Gerlach v. Michigan Bell Telephone Co.*, 448 F.Supp. 1168, 1172 (E.D. Mich. 1978). When considering the single establishment issue, federal courts have consistently rejected the extension of the statutory establishment requirement to separate offices of an employer that are geographically and operationally distinct. *Bartelt v. Berlitz School of Languages of America, Inc.*, 698 F.2d 1003, 1007 (9th Cir.), *cert. denied*, 104 S.Ct. 277 (1983); *Jacobson*, 573 F.Supp. at 567-68; *Alexander v. University of Michigan-Flint*, 509 F.Supp. 627, 629 (E.D. Mich. 1980); *Wetzel v. Liberty Mutual Insurance Co.*, 449 F.Supp. 397, 405-07 (W.D. Pa. 1978); *Gerlach*, 448 F.Supp. at 1172; *Schultz v. Corning Glass Works*, 319 F.Supp. 1161, 1163-64 (W.D. N.Y. 1970), *modified on other grounds*, 474 F.2d 226 (2nd Cir. 1973), *aff'd*, 417 U.S. 188 (1974); *cf. Brennan v. Goose Creek Consolidated Independent School District*, 519 F.2d 53, 58 (5th Cir. 1975) (single establishment based upon highly centralized control of hiring, wages, work assignments, scheduling and daily job duties in local elementary school district).

In *Jacobson*, 573 F.Supp. 565 (D. Minn. 1983), a case similar to this one, the court held that a local branch of a company with offices nationwide was a "separate establishment," and thus plaintiff's salary could be compared only with other employees in the local office for purposes of establishing an Equal Pay Act violation. 573 F.Supp. at 568. Similarly, in *Gerlach v. Michigan Bell Telephone Co.*, 448 F.Supp. 1168 (D.C. Mich. 1978), each individual office of the telephone company was considered a "separate establishment." We had occasion to consider the issue

in *Bartelt v. Berlitz School of Languages of America, Inc.*, 698 F.2d 1003 (9th Cir. 1983), and ruled that language schools owned by the same corporation were "separate establishments." Thus, the plaintiffs, who were female directors of Berlitz schools, could not succeed in establishing an Equal Pay Act claim by comparing their salaries with the salaries paid to male directors at other Berlitz schools. *Id.* at 1005-07.

[10] We agree with the district court that, as a matter of law, Foster has failed to produce facts sufficient to indicate that Arcata's Nellis and Fort Ord offices are the same establishments under the Equal Pay Act. Thus, she cannot establish a violation of the Act by comparing her salary to Hamby's. Arcata's Nellis and Fort Ord offices were hundreds of miles apart and operationally distinct. Although the Nellis and Fort Ord contracts were both negotiated from Arcata's corporate headquarters in Burlingame, California, the day-to-day contract performance occurred at the separate sites. Each office was independently managed for different customers (Air Force and Army) with different operational needs. The Nellis facility provided the Air Force with on-site engineering and other technical support services, whereas the Fort Ord project provided the Army with primarily experimental and managerial support. In addition, the Nellis and Fort Ord projects were operated under separate budgets and were managed by separate project managers who had independent decisionmaking authority over members of their staff.

[11] Appellant also has failed to articulate specific facts demonstrating that male employees other than Hamby, and who worked within the same establishment as she, performed substantially equal work for which they were paid more. Consequently, we find no triable issues of fact on appellants Equal Pay Act claim, and affirm the judgment of the district court.

B. Title VII

Appellant also claims intentional wage discrimination because of her sex in violation of Title VII. Section 703(a) of that statute makes unlawful differentials in wages on the basis of a person's

sex.[4] *County of Washington, Oregon v. Gunther*, 452 U.S. 161, 168, 101 S.Ct. 2242, 2247 (1981); *Spaulding*, 740 F.2d at 700. In *Gunther*, the Supreme Court affirmed our holding, 623 F.2d at 1313, that a Title VII cause of action exists outside the scope of the Equal Pay Act. The court, however, did not determine "the precise contours of lawsuits challenging sex discrimination in compensation under Title VII." 452 U.S. at 181, 101 S.Ct. at 2254.

We have held that the coverage of Title VII is much broader than that of the Equal Pay Act. *Bartelt*, 698 F.2d at 1005. Unlike the Equal Pay Act, Title VII does not contain a "single establishment" requirement. *Id.* at 1007. However, when a Title VII claimant contends that she has been denied equal pay for substantially equal work, as here, Equal Pay Act standards apply.[5] *Gunther v. County of Washington*, 623 F.2d 1303, 1318 (9th Cir. 1979), *aff'd*, 452 U.S. 161, 101 S.Ct. 2242; *Piva v. Xerox Corp.*, 654 F.2d 591, 598 & n.5 (9th Cir. 1981) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)).

The Equal Pay Act standards require the plaintiff to bear the initial burden of showing that: (1) the work of the employees of one sex required the exercise of substantially equal skill, effort, and responsibility and was performed under working conditions

[4]Section 703(a) of Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" or to "limit, segregate, or classify his employees or applicants" because of sex. 42 U.S.C. § 2000e-2(a).

[5]When a Title VII wage discrimination claim is not based on an equal work theory, it must be analyzed separately under Title VII standards. *Gunther*, 623 F.2d at 1318; *see Spaulding*, 740 F.2d at 700-709 (applying disparate treatment and disparate impact analyses).

Foster also advanced a "comparable worth" theory in support of her disparate treatment model of wage discrimination under Title VII. This district court properly ruled against this claim. Even if the "comparable worth" theory can sustain a Title VII action, Foster produced no objective evidence indicating sex-based wage discrimination. *See American Federation of State, County, and Municipal Employees v. Washington*, Nos. 84-3560, 84-3590, slip op. at 11-13 (9th Cir. Sept. 4, 1985).

similar to that of employees of the opposite sex; and (2) the pay of men and women was unequal. *Piva*, 654 F.2d at 598. The basic allocation of burdens and the order of proof for Title cases alleging disparate treatment, discussed *supra* at __, apply here. For purposes of summary judgment, Foster need only produce evidence sufficiently specific to support a reasonable inference that the facts required for her prima facie case are true. The burden then shifts to the employer to demonstrate that the unequal pay results from a merit system, seniority system, a system linking earnings to productivity, or any factor other than sex. *Id.* at 598-99; *Corning Glass Works*, 417 U.S. at 196, 94 S.Ct. at 2229; 42 U.S.C. § 2000e-2(h).

[12] The district court rejected appellant's claim because it found that she failed to set forth evidence sufficient to establish a prima facie case of intentional wage discrimination. We agree. Although Foster succeeded in showing that she was paid $7500 less as Corporate Contracts Administrator than Hamby was paid as Contract Compliance Administrator for the Nellis contract, she did not present facts from which an inference can arise that her position and Hamby's were substantially equal.

We evaluate whether appellant established the basis for an inference that her job and Hamby's required the exercise of substantially equal skill, effort, and responsibility, by considering actual job performance and content, not job titles, classifications or descriptions. *Gunther*, 623 F.2d at 1309. The record indicates that the two positions were created at different times, for substantially different purposes, and thus did not require the same kinds of skills and performance.

Arcata acquired the Nellis contract in 1979, the purpose of which was to provide the Air Force with "Operation and Maintenance of Range Instrumentation." This required Arcata to provide primary engineering and other technical support services. Initially, the contract concerned a 2.4 million dollar project. In October 1980, Arcata was awarded the 8.4 million dollar Fort Ord contract. That contract was to provide a Scientific Support Laboratory for the Army, which involved primarily experimental, managerial and support services.

Foster was hired as Corporate Contracts Administrator at approximately the same time as the Ford Ord contract was awarded. She was responsible for the management of all Arcata's government contracts, including insuring compliance with contract requirements and negotiating contract terms and conditions. Her work occasionally required her to travel to the corporate headquarters in Burlingame, to Nellis, and to Sacramento, although her permanent station was in Monterey.

In late 1981, the government notified Arcata that it would be accepting competitive bids on the Fort Ord contract. Arcata was out bid in July 1982, and the contract was phased out by the end of that year. In contrast, Arcata's Nellis contract had grown substantially. By 1983, it was valued at about 5.3 million.

Hamby was hired in May 1982, when the future of the Fort Ord contract was uncertain. He was hired by James Enus to perform the day-to-day management of the Nellis contract. Essentially, Hamby was to be a "trouble shooter," responsible for the direct handling of problems stemming from the contract operations. His job thus required constant interaction with the Air Force and permanent station in the Las Vegas area. These requirements were substantially different from those of Foster's job.

[13] We conclude that the district court was correct in determining that, as a matter of law, appellant could not succeed in demonstrating that she was the victim of intentional wage discrimination under Title VII. Even though she was paid less than Hamby, her claim cannot succeed because the responsibilities of their positions were not substantially equal.

C. ADEA

[14] Foster also claims intentional wage discrimination because of her age in violation of ADEA, 29 U.S.C. § 623(a)(1). Because Foster failed to present facts from which an inference can arise that her position and Hamby's were substantially equal, *see* discussion *supra* Part III. B, we agree with the district court that

Foster failed to establish a prima facie case of intentional wage discrimination.

IV.

DISCOVERY CLAIM

[15] Appellant finally contends that the district court abused its discretion in proceeding to summary judgment when discovery had not been completed. We have stated that a district judge has wide latitude in controlling discovery, and its rulings will not be overturned in the absence of a clear abuse of discretion. *White v. City of San Diego*, 605 F.2d 455, 461 (9th Cir. 1979); *Canadian American Oil Co. v. Union Oil Co.*, 577 F.2d 468, 473 (9th Cir.), *cert. denied*, 439 U.S. 912 (1978).

We reject appellant's claim because she failed to follow the proper procedures under the Federal Civil Rules of Procedure for obtaining a continuance or other appropriate discovery order when opposing a motion for summary judgment. Under Rule 56(f),[6] a party may apply for a continuance of the proceedings to permit further discovery. Appellant made no such motion. Consequently, we find that the district court did not abuse its discretion in granting Arcata's motion for summary judgment. *Thi-Hawaii v. First Commerce Financial Corporation*, 627 F.2d 991, 994 (9th Cir. 1980).

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[6]Fed. R. Civ. P. 56(f) provides:

> * * * Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

V.

CONCLUSION

Appellant has failed to raise genuine issues of fact concerning her claims of intentional hiring discrimination under Title VII or the ADEA. Her Equal Pay Act claim also fails because she did not articulate facts which, if true, would indicate that men were paid more in the same establishment for substantially equal work. Additionally, because appellant did not show that her job and Hamby's job were "substantially equal," she cannot succeed in proving a wage discrimination claim under Title VII. We have found no abuse of discretion in the district court's discovery ruling.

The judgment of the district court is *AFFIRMED*.

APPENDIX "C"

FILED
NOV 25, 1985
CLERK, U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LYNN FOSTER,	)	No. 84-2218
Plaintiff-Appellant,	)	D.C. No. C-83-20084 WAI
v.	)	ORDER
ARCATA ASSOCIATES, INC.,	)	
Defendant-Appellee.	)	

Before: WALLACE and POOLE, Circuit Judges, and STEPHENS, District Judge.

The petition for rehearing is denied.

DECLARATION OF MAILING

I, the undersigned, declare:

I am a citizen of the United States, employed in Monterey County, State of California, over the age of 18 years, and not a party to the above-entitled cause. My business address is Fremont Professional Center, Seaside, CA 93955. I served the foregoing document by depositing a true copy thereof in the United States mails in Seaside, State of California, on January 16, 1986, enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as follows:

John C. Cook
Pillsbury, Madison & Sutro
Attorneys at Law
225 Bush Street
San Francisco, CA 94120

Circuit Judges WALLACE & POOLE,
and STEPHENS, District Judge
c/o Clerk, U. S. Court of Appeals
for the Ninth Circuit
U. S. Court of Appeals and Post
Office Bldg., 7th & Mission Sts.
P. O. Box 547
San Francisco, CA 94101

Hon. WILLIAM A. INGRAM, Judge of the
U. S. District Court, c/o Clerk
280 South First St.
San Jose, CA 95113

Executed on January 16, 1986, at Seaside, California.

I declare under penalty of perjury that the foregoing is true and correct.

SAUL M. WEINGARTEN